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EXAMINER	
MADSEN, ROBERT A	

ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 06/29/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 09/780,273	Applicant(s) FROSETH ET AL	
	Examiner Robert Madsen	Art Unit 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☐ Responsive to communication(s) filed on _____.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-99* is/are pending in the application.

4a) Of the above claim(s) *1-83* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *84-99* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date *4,5,7*.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Election/Restrictions

1. Restriction to one of the following inventions is required under 35 U.S.C. 121:

   I. Claims 1-64, 76-83, drawn to a method for creating, selecting, ordering, and purchasing a customized food product, classified in class 705, subclass 26.

   II. Claims 65-66, drawn to a method of producing a nutritional label, classified in class 283, subclass 44.

   III. Claims 67-75, drawn to a method of selecting a customized food product by utilizing a recommendation path and choosing either a one blend only path or specialized blends path, classified in class 705, subclass 27

   IV. Claims 84-99, drawn to a method of preparing popcorn, classified in class 426, subclass 234 and 107.

2. The inventions are distinct, each from the other because:

3. Inventions I,II, III, and IV are unrelated. Inventions are unrelated if it can be shown that they are not disclosed as capable of use together and they have different modes of operation, different functions, or different effects (MPEP § 806.04, MPEP § 808.01). In the instant case the different inventions have different modes of operation, different functions, and different effects. Inventions I,III and IV differ from invention II because it is specifically drawn to the method/computerized medium for selecting and customizing the food product itself. Invention II can be used separately from invention I to create food labels for non-customized food or to create labels for food that has not

been packaged and sent, i.e. informational only, as it is not affixed to the product. Invention IV differs from inventions I and III, in that it has a different effect, i.e. it is the prepared product being utilized while invention I is the creation , selection, ordering, and purchasing of the customized food product and invention III is the mode of operation of selection of the customized food product via the interface via one or two paths. Inventions I and III differ in that they have different modes of operation and as disclosed could contain a plurality of paths or only a singular pat or just generate a recommendation without a "path" structure.

4. Because these inventions are distinct for the reasons given above and have acquired a separate status in the art as shown by their different classification, the search required for one group is not required for the other groups, and have required separate status in the art because of their recognized divergent subject matter, restriction for examination purposes as indicated is proper.

5. During a telephone conversation between Examiner Harle and Barbara Clark on February 25,2004 a provisional election was made by Barbara Clark with traverse to prosecute the invention of Group IV, claims 84-99. Affirmation of this election must be made by applicant in replying to this Office action. Claims 1-83 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

Specification

6. The amendment filed January 23,2004 is objected to under 35 U.S.C. 132 because it introduces new matter into the disclosure. 35 U.S.C. 132 states that no amendment shall introduce new matter into the disclosure of the invention. The added material which is not supported by the original disclosure is as follows: " The single serving pouch package 2302 can be a microwave package having instructions on the back for preparing the enclosed customized food product in the microwave oven. In one embodiment, the single serving pouch package 2302 is similar to the type of bag currently used for popping popcorn in a microwave oven. In an other embodiment, the single serving pouch package 2302 can also be designed to be a convection air oven package or possibly an air popper package and the instructions modified accordingly".

7. It appears to be applicant's intention to rely on the disclosure of 09/596275 to provide support for the microwave pouch. Applicant has disclosed in the present application that the disclosure of 09/596275 (or '275) is incorporated by reference in its entirety. However it is noted that the pouch described in '275 (page 32 and 33) is a microwave "puffing" package which "can be *similar* to bags used for popping popcorn in a microwave oven". However, the present specification discloses a "single-serving pouch" and not a puffing package which can be similar to bags used for popping popcorn in a microwave oven. Additionally, the present application discloses that puffing and popping are two distinct processes (Page 15) ,and while '275 teaches a "puffing"

package that is *similar* to microwave popcorn bag, it is not even clear if the puffing package of '275 *can* be used for *popping* in a microwave.

8. Other than reference to 09/596275, the examiner notes two locations in the original specification that pertain to this new subject matter:

- " A customized food product includes any type of snack, e.g., snack bar, snack chip, pretzel, snack mix, power bars, granola mixes, popcorn snacks, etc. " (Page 12 of Specification).
- "Additionally, whether ordering a customized finished cereal or a customized half-product (or any other type of customized food product), the consumer can further customize as desired at home by adding various flavorings, fresh particulates (e.g. sliced bananas, strawberries, dried fruits, nuts, and so forth), in addition to the conventional products typically added to the food, e.g., milk and milk products are typically added to cereal, and so forth. The consumer can further "finish" a customized food product in any manner, such as by cooking, baking, grilling, heating, puffing, popping, etc. For example if a hot cereal has been chosen as the customized food product, the consumer can heat it in the microwave prior to serving. Other products may need to be thawed, kept chilled, and so forth. Additionally, the consumer can grind a finished or freshly puffed cereal, as desired, to create any type of grain-based beverage, for example, or other chilled or frozen product at home." (Page 79).

9. Based on the paragraph from Page 79, it appears that the "finishing" step is to be performed without food package (i.e. adding flavorings, milk, grilling, grinding the cereal, etc.). Applicant has not disclosed in the original application that the customized product is finished while in the pouch, and thus has no support for a microwave popcorn package, convection air package, or air popper package.

10. Applicant is required to cancel the new matter in the reply to this Office Action.

Claim Rejections - 35 USC § 112

11. The following is a quotation of the first paragraph of 35 U.S.C. 112:

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

12. Claims 84-99 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

13. Regarding claims 84-90,92-95,96-98, applicant does not have support in the original specification for a microwave popcorn pouch (i.e. a pouch that is intended for the popping popcorn in the microwave) for the same reasons discussed above regarding the new matter added to the specification

14. Regarding claim 91 and 99, applicant does not have support in the original specification for a method of preparing a *sweet and salty* popcorn food by microwave

treating with an *adequate amount* of salt to provide a salty taste or a *sweetening effective amount* of sucralose. The only mention of sucralose is in combination with a cereal base (Page 21). Furthermore, applicant has provided absolutely no guidance how one of ordinary skill in the art determines the amount of salt required to provide a salty taste or the sweetening effective amount of sucralose.

15. The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

16. Claim 91 and 99 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Regarding claim 91 and 99, applicant does not have support in the original specification for a method of preparing a *sweet and salty* popcorn food by microwave treating with an *adequate amount* of salt to provide a salty taste or a *sweetening effective amount* of sucralose. The terms "adequate amount of salt" in claim 91 and "a level to provide a salty taste" in claim 99, and "sweetening effective amount of sucralose" in claims 91 and 99 are all relative terms which render the claims indefinite. The terms have not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. One of ordinary skill in the art would recognize that the amount of salt required to provide a "salty taste" and the amount of sucralose required to provide " an effective amount of sweetness" are indefinite quantities, depending on individual taste.

Claim Rejections - 35 USC § 102

17. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

18. Claim 92-94 are rejected under 35 U.S.C. 102(a) as being anticipated by Google Groups (12/9/1999).

19. Google Groups teaches, in an effort to provide a low carbohydrate snack, combining ACT II butter lite popcorn snack, which includes salt and oil, in combination with a sugar twin or sucralose (i.e. Splenda), wherein the popcorn snack is served in a microwave bag (Page 1, 12/9/1999 message).

Claim Rejections - 35 USC § 103

20. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

21. Claims 84-86,91,99 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ezzat(GB 2250266 A) in view of Google Groups (12/9/199).

22. Ezzat teaches preparing popcorn in microwave oven by placing butter as recited in claim 85 salt as recited in claim 86 , sugar and unpopped kernels in a pouch for one

time use for a single user, which would serve as a single serving microwave pouch as recited in claims 84,91 and 99 (Page 3, lines 1-23). Ezzat is silent in teaching adding a sweetening effective level of sucralose, as recited in claims 84,91 and 99.

23. Google Groups teaches how to make a low carbohydrate sweet and salty popcorn by combining commercially available microwave popcorn with sucralose (i.e. Splenda) to achieve a sweet flavor, i.e. caramel corn (Page 1, 12/9/1999 message).

24. Therefore, it would have been obvious to modify Ezzat and include sucralose in the bag since Google Groups teach adding sucralose will provide a low carbohydrate, sweet and salted popcorn product.

25. Claim 87 is rejected under 35 U.S.C. 103(a) as being unpatentable over Ezzat (GB 2250266 A) in view of Google Groups (12/9/199) as applied to claims 84-86, 99 above further in view of Daenkindt (EP335852A)

26. Modified Ezzat teach using a sugar twin or sucralose, in combination with microwave popcorn, but is silent in including acesulfame K. Daenkindt et al. also teach sugar substitutes including sucralose, but further include acesulfame K. Daenkindt et al. teach adding the mixture comprising saccharose, sucralose, and acesulfame K has the same sweetening power as saccharose per unit volume but because some of the saccharose has been substituted with sucralose and acesulfame K, the sugar provides a reduced caloric value (English Abstract, Page 2). Therefore, it would have been obvious to further modify Ezzat and include acesulfame K since Daenkindt et al. teach

a blend of saccharose, sucralose and acesulfame K provides the same sweetness per unit volume of saccharose, at a reduced caloric level.

27. Claims 88-90 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ezzat (GB 2250266 A) in view of Daenkindt (EP335852A) and Google Groups (12/9/199)

28. Ezzat teaches preparing popcorn in microwave oven by placing butter as recited in claim 85 salt as recited in claim 86 , sugar and unpopped kernels in a pouch for one time use for a single user, which would serve as a single serving microwave pouch as recited in claims 84,91 and 99 (Page 3, lines 1-23). Ezzat is silent in teaching adding a sweetening effective level of sucralose, as recited in claims 84,91 and 99.

29. Daenkindt et al. also teach sugar substitutes including sucralose, but further include acesulfame K. Daenkindt et al. teach adding the mixture comprising saccharose, sucralose, and acesulfame K has the same sweetening power as saccharose per unit volume but because some of the saccharose has been substituted with sucralose and acesulfame K, the sugar provides a reduced caloric value (English Abstract, Page 2).

30. Google Groups is relied on as evidence of the conventionality of substituting a sugar twin or sucralose, in combination with microwave popcorn, in order to obtain a low carbohydrate, which would also be low calorie, sweet and salty popcorn. (Page 1, 12/9/1999 message).

31. Therefore, it would have been obvious to further modify Ezzat and include acesulfame K since Daenkindt et al. teach a blend of saccharose, sucralose and acesulfame K provides the same sweetness per unit volume of saccharose, at a reduced caloric level.

32. Claim 95 is rejected under 35 U.S.C. 103(a) as being unpatentable over Google Groups (12/9/199) as applied to claims 92-94 above further in view of Daenkindt (EP335852A)

33. Google Groups teaches using a sugar twin or sucralose, in combination with microwave popcorn, in order to obtain a low carbohydrate, which would be a low calorie, sweet and salty popcorn, but is silent in including acesulfame K. Daenkindt et al. also teach sugar substitutes including sucralose, but further include acesulfame K. Daenkindt et al. teach adding the mixture comprising saccharose, sucralose, and acesulfame K has the same sweetening power as saccharose per unit volume but because some of the saccharose has been substituted with sucralose and acesulfame K, the sugar provides a reduced caloric value, (English Abstract, Page 2). Therefore, it would have been obvious to further modify Google Groups and include acesulfame K since Daenkindt et al. teach a blend of saccharose, sucralose and acesulfame K provides the same sweetness per unit volume of saccharose, at a reduced caloric level that would also result in a reduced carbohydrate level, and one would have been

substituting one saccharose substitute for another for the same purpose: reducing carbohydrates/calories.

34. Claims 96-98 are rejected under 35 U.S.C. 103(a) as being unpatentable over Google Groups (12/9/199) in view of Daenkindt (EP335852A)

35. Google Groups teaches, in an effort to provide a low carbohydrate snack, which would also be low calorie, combining ACT II butter lite popcorn snack, which includes salt and oil, in combination with a sugar twin or sucralose (i.e. Splenda), wherein the popcorn snack is served in a microwave bag (Page 1, 12/9/1999 message). Google Groups is silent in teaching Acesulfame K.

36. Daenkindt et al. also teach sugar substitutes including sucralose, but further include acesulfame K. Daenkindt et al. teach adding the mixture comprising saccharose, sucralose, and acesulfame K has the same sweetening power as saccharose per unit volume but because some of the saccharose has been substituted with sucralose and acesulfame K, the sugar provides a reduced caloric value (English Abstract, Page 2).

37. Therefore, it would have been obvious to modify Google Groups and include acesulfame K since Daenkindt et al. teach a blend of saccharose, sucralose and acesulfame K provides the same sweetness per unit volume of saccharose, at a reduced caloric level, which would also result in a reduced carbohydrate level, and one would have been substituting one saccharose substitute for another for the same purpose: reducing carbohydrates/calories.

Conclusion

38. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Glass et al. (US 6013291) and Gibernau et al. (US 5878910) teach adding sugar to microwave popcorn bags. Freeport et al. (US 5688543) teach adding sugar substitutes, and what appears to be acesulfame K, to unpopped popcorn kernels. Mazur (US 5041541) teaches general sugar substitutes.

39. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (571) 272-1402. The examiner can normally be reached on 7:00AM-3:30PM M-F.

40. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

41. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Robert Madsen
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